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IN THE

Supreme Court of the United States

October Term, 1952.

No. 44

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENETT, STEWART M. HANSON, and W. R. McENTIRE, *Petitioners,*

and

MELVA SEAMONS and ROY HILL, d. b. a. SEAMONS TRUCK LINES, and JOSEPH J. MILNE TRUCK LINES, INC., a Corporation, *Petitioners,*

v.

WYCOFF INCORPORATED, a Corporation, *Respondent.*

ANSWER OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

WAYNE C. DURHAM,
HAROLD S. SHERTZ,
Attorneys for Respondent.

Of Counsel:
KING, ANDERSON & DURHAM,
SHERTZ, BARNES, & SHERTZ.

International, 236 Chestnut St., Phila. 6, Pa.

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WYCOFF COMPANY, INCORPORATED, A CORPORATION,

Respondent.

ANSWER OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Respondent, Wycoff Company, Incorporated, prays that the petition for writ of certiorari be denied and the judgment of the United States Court of Appeals for the Tenth Circuit, and the judgment denying petition for rehearing therein, be thereby affirmed.

Question Presented.

The question presented by petitioners, confines the issue to the narrow scope to which the District Court, below, sought to limit consideration and, therefore, should be amended to read:

When distributors of motion pictures ship prints thereof from California and New York via their branch exchange offices in Utah for showing by exhibitors of motion pictures in the area of several states served by such branch exchanges, under contracts between such distributors and exhibitors providing for exhibition under limited copyright, is the transportation between such exchanges in Utah and exhibitors in Utah in interstate commerce?

Statement.

To correct certain inaccuracies and omissions in the "Statement" of the petition, pages 3-6, it is deemed necessary to set forth the following:

The Court of Appeals, below, in its original opinion (R. 89-90) interpreted the facts of this case in a different manner than they are presented in the present petition (R. 3-6).

Petitioner, here, then petitioned that Court for rehearing (R. 93-128).

In denying rehearing, the Court of Appeals, below, in its supplemental opinion (R. 129) said:

> "An opinion speaks for itself and the fact that it may be misconstrued does not ordinarily require an opinion in support of an order denying a petition for rehearing, but in this case we feel that a statement is warranted, not only because we feel that the basis of the opinion is misconstrued, but also because *the petition for rehearing in setting out evidence, which it is claimed we ignored, perhaps inadvertently omits a part of the testimony of some witnesses which is essential to place such testimony in proper focus.*" (Emphasis supplied R. 129.)

Petitioner, in seeking the jurisdiction of your Court, nevertheless, persists in substantially the same interpretation of the facts, as in its prior presentation to the Court of Appeals, below.

The jurisdiction of your Court is sought to give the defeated party in the Court of Appeals, below, another hearing.

Magnum Import Company v. Coty, 262 U. S. 156.

As will be later developed, under the facts of this case, the opinions of the Court of Appeals, of the Tenth Circuit, are in harmony with the decisions of the Courts of the other circuits and with the decisions of your Court, and no question of public interest within the scope of this Record, is involved.

It is therefore, deemed desirable to further indicate the error of the petition, in its "appreciation" of tne factual issue.

Respondent, Wycoff Company, Inc., a corporation is engaged in the transportation of motion picture film including newsreels between motion picture exchanges at Salt Lake City, Utah, and exhibitors of motion pictures at various points in Utah, under authority of a certificate of public convenience and necessity issued by the Interstate Commerce Commission. This certificate authorizes such transportation between the Salt Lake City exchanges and points not only in Utah but as well in the States of Idaho and Montana (R. 1). Petitioner, Public Service Commission of Utah, issued Respondent an "Interstate License" to transport under the authority of the certificate issued by the Interstate Commerce Commission, within the State of Utah (R. 2).

Petitioner, in answer to these facts averred in the complaint, in the District Court, below, admitted that the transportation of newsreels between points in Utah is in interstate commerce (R. 3). The answer takes exception to these facts only to the extent that they infer that the transportation of motion picture film, other than newsreels, within the State of Utah, is interstate in character, or that the "Interstate License" issued by it, declared that the

transportation of motion picture film within the State of Utah is in interstate commerce or interstate in character (R. 3-4).

Further facts admitted by the reply of Petitioner to the request for admission of facts by Respondent in the District Court, below, are as follows:

The transportation of newsreels is interstate in character and has been so adjudged by the Interstate Commerce Commission. The Public Service Commission of Utah has threatened to and is attempting to stop Appellant from transporting all motion picture films, including newsreels, between points in the State of Utah (R. 24). Newsreels are customarily produced, processed, manufactured and packaged outside of the State of Utah, and are shipped from out-state points into the State of Utah for the purpose of being exhibited in theatres in Utah and the surrounding states. These newsreels are customarily booked under an agreement whereby the theatres in Utah and the other states contract in advance to receive and exhibit the newsreels prior to actual delivery in the State of Utah. It is customary for exhibiting theatres to show not only a newsreel, but also other films designated as a feature, comedy and other short subjects, all of which are distributed by different national film companies having branch offices in Salt Lake City, Utah. The distributors have principal offices in New York and California, and maintain branch offices in Salt Lake City from which they distribute the various types of motion pictures throughout Utah and the surrounding states (R. 5, 8).

In addition to the newsreels, the other motion picture films are likewise processed, manufactured and packaged outside the State of Utah for shipment to the State of Utah (R. 6, 8). These film distributors do not sell newsreels, features nor comedy films, but only license the right to exhibit them, and the ownership remains in the film distributors (R. 8, 9). The local distributing office in Utah is merely a branch office of the non-resident film company

(R. 11). The branch offices so maintained by some twelve national distributors (R. 5, 6) distribute the film not only in the State of Utah, but also in parts of Wyoming, Montana, Oregon, Idaho and Nevada (R. 14).

With the above facts admitted by agreement, the factual issue is narrowed to the following:

Is the other motion picture film (features, comedies and short subjects) interstate in character in the same manner as admitted for newsreels?

To determine the answer to this question, it is necessary to review the entire picture of the transaction in order to determine the essential nature of the commerce.

Witnesses from five national distributors testified and showed the practice to be as follows:

Salesmen from the branch exchange offices of the distributors in Salt Lake City solicit applications from exhibitors, in the territory of the states served by these exchanges, to be licensed to exhibit the motion picture described therein. These applications which are in the form of a standard contract, are then sent by the exchange to the main office of the distributor, generally in New York, for approval or rejection. The contract for such licensed showing by the exhibitor does not become effective until approved and accepted by the home office. (R. 28-30, 40, 49, 56, 58, 59, and Exhibits of agreements following R. 76.)

These agreements designate the theatre and its location and describe the pictures licensed to be there shown, the conditions and limitations under which the distributor permits the exhibitor to have them for showing, the time the exhibitor may retain them for showing, provide the means by which the exhibitor may obtain the prints from the distributor and return them to the distributor. (See contracts following R. 76.)

Exhibit No. 1 (following R. 76) is a standard form of Republic Pictures (R. 58). The first paragraph of this agreement specifically provides:

"LICENSE—FIRST: The *Distributor grants the Exhibitor,* and the Exhibitor accepts, *a limited license under the respective copyrights* of the motion pictures described in the Schedule hereof and under the copyright of any matter included in sound recorded therewith, *to exhibit* publicly *said motion pictures* and to reproduce for public performances such recorded sound in synchronism therewith, but only on 35 mm. film, *at the said threatre and for the run, the number of consecutive days specified in the Schedule, and on the play dates therein provided for only, and for no other use or purpose;* provided that the reproducing equipment in the theatre will operate reliably and efficiently to reproduce such recorded sound with adequate volume and high quality; and provided further that if copyrighted musical compositions are included in such recorded sound, the Exhibitor will have obtained at the date or dates of the exhibition of each of such motion pictures a valid license to perform publicly the said copyrighted musical compositions. If more than one theatre is herein designated, the said motion pictures are licensed for exhibition at only one of such theaters unless otherwise in the Schedule specifically provided. (Emphasis supplied.)

"TERM AND WARRANTY—SECOND: (a) The Distributor agrees, subject to each and all of the terms and conditions hereof to deliver to the Exhibitor, and the Exhibitor agrees to exhibit at said theatre, upon the date or dates herein provided for, a positive print of each of said motion pictures, except such as may be excluded, as provided in Clauses FOURTEENTH AND FIFTEENTH hereunder."

The fourth paragraph of the agreement requires that the exhibitor shall pay the distributor for any part of the print lost, stolen, destroyed or injured, while in the hands of the exhibitor, and with the distinct condition that, "Such

payment, however, shall not transfer title to or in any such positive print to the exhibitor."

Clearly the obligation of the distributor, therefore, is to service the exhibitor with a print to permit the showing under the limited license under copyright of the picture specified by the agreement. The prints are not sold but remain at all times the property and under control of distributor.

The print during the period it is in the exchange area, remains the property of the distributor and under its full control. The agreement provides for return by exhibitor to distributor when it has served its "limited license under copyright." Full discretion as to maintenance of the prints remains in distributor, which can require the print to be returned for inspection of "circuited" to another exhibitor in the same or another state (R. 36-37) or to another exchange area (R. 31, 32, 61).

The absolute control which distributor maintains, at all times, over the film, is made clear by the testimony of witness Elliott S. Windward of RKO Pictures, Inc., referred to in the supplemental opinion of the Court of Appeals (R. 129), which is as follows:

> "Q. Can you state whether or not your office exerts any control over what shipper (carrier) will be employed? Must certain requirements be met by carriers for you to release films to it?
>
> "A. He must have the proper credentials involving insurance and protection of the prints while in his possession; he must be a licensed carrier, and he must also be approved by our home office.
>
> "Q. The home office requires approval?
>
> "A. Yes."
>
> * * *
>
> "Q. After the theater which has the motion picture film is through with it and is going to circuit it to the next theater, who has the determination where the next showing will be made of that film?

"A. The distributor. We do that.

"Q. You do that?

"A. We do that.

"THE COURT: That is the booking?

"A. That is the booking problem.

"THE COURT: You have all these pictures booked around a circuit. Your bookings determine. I think that would be obvious.

"Q. (By Mr. Durham) Directing your attention to bookings, who determines as between the exhibitor, your office and the New York office in what order bookings will be made?

"THE COURT: He has already explained that. The theater exhibitor requests the film on a certain date, so he starts the thing going, and then if Mr. Windward's office cannot supply the print he advises them and says: don't you want another picture on that date, or do you prefer a different booking date. He has testified to that already.

"Q. No booking is made until a contract has been entered into?

"A. No.

"Q. And no contracts are made except upon approval of your New York office?

"A. That is right."

The issue is still further narrowed by the admission of petitioner, that the transportation of "newsreels" between points in the State of Utah is in interstate commerce and interstate in character and denying that "short subjects" and "feature film" is not interstate in character or moving in interstate commerce when transported by respondent between the exchanges and the exhibitors in Utah.

"Newsreels"—The answer of defendant (R. 3) admits the allegation of the complaint (R. 1) that the transportation of newsreels between Salt Lake City, Utah, and points

in Utah is in pursuance of the Certificate of Public Convenience and Necessity issued to Respondent by the Interstate Commerce Commission. Agreements for the licensing of the showing of newsreels are for an issue covering a year for a showing on 104 or 52 specified days of each week at the exhibition point specified in the agreement. These agreements are concluded "before the news has happened" and necessarily before the prints have been produced (R. 65). A chart of locations of newsreels is kept (R. 48).

"Short Subjects"—Agreements for licensing short subjects are also written in series for showing on specified day of each week. The agreement could cover 3 or 4 different series of "shorts" or it could be confined to one series such as a cartoon series. In the greater number of cases, the agreement is concluded prior to the actual shipment from the laboratory. The contract is on the basis of a year. Necessarily, also, they are produced after the agreements are entered into (R. 29, 65).

"Features"—Sixty percent of the licensing of Feature Pictures is contracted for prior to the receipt of the prints (R. 40). Some features are also contracted for before they are produced and for showing on certain days of the week (R. 56-57). The principal difference between feature pictures and newsreels and shorts is that the exact date of showing at a particular exhibition point may not be determined until after the prints have been received by the exchange (R. 28, 60), although in some instances a specific date is fixed (R. 51). The agreement (Exhibit 1) fifth paragraph, specifies, "Unless otherwise agreed upon or unless definitely specified or otherwise provided for in the Schedule, the exhibition date or dates of each of said motion pictures shall be determined" as therein provided. In general practice a schedule of bookings is worked out between the exhibitor and the exchange and submitted to the home office for approval (R. 51).

The prints are shipped from the laboratories of the national distributors in New York, New Jersey and Cali-

fornia to the Salt Lake exchanges (R. 88, 46, 55), and thereafter the prints are delivered to the theatres and on the dates in accordance with this schedule of booking. The number of prints sent into the exchange, for each picture, is determined by the main office based upon its prior experience with respect to the need (R. 35, 58). The points to which the prints are shipped is governed by these bookings (R. 36-37). The main office is sent a copy of the daily shipping receipts of each print (R. 61). Under rules and regulations of the main office the exchange exercises discretion as to whether the prints shall be returned directly to the exchange for inspection, circuited to another theatre, or to another exchange (R. 31, 32, 61). When the print has served its purpose of being distributed to permit its licensed showing by the exhibitors it is sent out of the territory to such point as is directed by the main office for junking or other purpose (R. 31, 32, 54, 55, 65).

The Court of Appeals, below, in its supplemental opinion (R. 132) fully appraises the distinguishing and controlling nature of these facts:

> "The record is devoid of any evidence showing that the distributors accumulate a stock pile of films in the exchanges, where the exhibitors may go, make their selection, purchase what they want, and take it with them, as you would do when you go to a retail merchandising store."

This finding is supported by and is in complete harmony under precisely similar facts, with *Kappler v. Republic Pictures Corp.*, 59 F. Supp. 112 (1945), which was affirmed by the Circuit Court of Appeals in 151 F. 2d 543 (1945), and by the Supreme Court per curiam 327 U. S. 757 (1945) rehearing denied, 327 U. S. 817 (1945). In that case, the District Court found that the distribution of film generally from the Exchange at Des Moines to other points in Iowa was part of the interstate movement from New York to the Exchange:

"The trouble with this contention is that it assumes that the films came to rest in Iowa. The defendant in this regard relies upon that class of cases where goods are purchased and shipped to a person in the state for resale and the shipment terminates before the resale is made. Walling v. Jacksonville Paper Co., 317 U. S. 564, 63 S. Ct. 332, 87 L. Ed. 460.

"The defendant overlooks, however, the fact that the shipments from New York and New Jersey to Iowa were made by the corporation to its branch office and were not completed transactions to a third party. • • •

"Under this situation, the goods did not come to rest in Iowa, but the interstate character of the transportation continued until the goods were in the hands of exhibitors, and even then they only stopped temporarily as the goods were licensed and not sold, and the transportation continued until after all the exhibitors had used them when they were returned to Des Moines and probably back to New York City."

The Circuit Court of Appeals, 151 F. 2d 543, 545, in affirming the above decision of the District Court, said:

"Defendant was not shipping the films to Des Moines to be stored nor for final delivery, but its business depended upon these films being kept in circulation. Plaintiff was an active factor in keeping the films in such circulation and use. We think it clear that the transportation of the films and their use must be viewed as a continuity, embracing shipments from New York and New Jersey to Des Moines, Iowa, and the shipment of them to and from Des Moines to other points of Iowa and other states."

Reasons for Denying the Writ.

To correct certain inaccuracies and omissions in the "Reasons for Granting the Writ", of the petition, it is deemed necessary to make the following statement.

1. Under this number, pages 8-9, the petition makes certain assumptions in an apparent effort to appeal for jurisdiction on the pretext that there is here resolved a question of importance which is in the public interest. These presumptions are unsupported by any fact and are entirely beyond the scope of this record.

This case is limited in its effect to the transportation of the specific commodity of motion picture film under the special circumstances in which such film is distributed and under the facts and circumstances of record.

The presumptions are contrary to law:

a. It was never conceived that a sovereign state had any regulatory jurisdiction over interstate commerce, other than legitimate police powers. In amending the Interstate Commerce Act by the addition of Part II (49 U. S. C. Section 303), the Congress defined interstate commerce as including that:

> "between places in the same state through another state; whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

b. The Interstate Commerce Commission from the inception of this amendment has found that the service of distributing film by motor carrier is a highly specialized one and has granted authority for service between points in film distribution areas without regard to state lines, *Film Transit, Inc., Extension of Operations*, 46 M. C. C. 1052 and *Transway, Inc., Common Carrier Application* 46 M. C. C. 1185; and newsreels between points in *Louisiana, Transway, Inc. v. Exhibitors Delivery Service, Inc.*, 51 M. C. C. 263.

c. The authority which respondent seeks to exercise, and as sustained by the Court of Appeals, below, is under a certificate issued by the Interstate Commerce Commission authorizing the transportation of motion picture film

over designated routes from Salt Lake City, Utah, to designated points in other states, with the right to serve the intermediate points in the State of Utah. Petitioner, Utah Public Service Commission, issued respondent a permit to operate under this authority between points in the State of Utah.

d. The Courts in rail rate cases and in motor carrier cases have consistently held that the transportation between the points in one state is in interstate commerce and under the jurisdiction of the federal government, and not the state government, where it is a continuing movement in interstate commerce.

2. The some twenty decisions cited under this number (2), pages 10-13, and under "Statement", pages 6-8, of the petition, completely fail to sustain the principal contention of petitioners that the decision of the Circuit Court of Appeals, Tenth Circuit, "is contrary to and in irreconcilable conflict with" the statement of the law by your Court and the Courts of other circuits.

This becomes entirely clear from a summary of these cited decisions, which fall under the following headings:

a. *Regulation:* All of the decisions are determined on the basis of facts as found in each case, just as the Court of Appeals, below, did in the instant case, in conformity with the finding of Justice McReynolds, in the cited case of *Public Utilities Commission v. Landon,* 249 U. S. 236 (1819) at 245:

> *"Interstate Commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods."* (Emphasis supplied.)

Controlling facts in the cited cases are, for example, where sold by consignee after arrival at designated destina-

tion, *A. C. L. R. R. v. Commission of Georgia*, 281 Fed. 321; *Chicago, Milwaukee & St. Paul R. R. v. Iowa*, 233 U. S. 334; delivery of oil into storage tanks for sale, *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257 (cited Court of Appeals, below, R. 89, with *U. S. v. Erie R. Co.*, 280 U. S. 98) and *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 12 F. (2d) 541; delivery upon surrender of order B/L to warehouse of consignee, *Boyd v. U. S.*, 275 Fed. 16;

b. *Statutory Construction:*

(1) State Tax Laws: Selected out of mass of goods in warehouse, *American Steel & Wire Co. v. Speed*, 192 U. S. 500; held for sale *Brown v. Houston*, 114 U. S. 622; *Pittsburgh Southern Coal Co. v. Bates*, 156 U. S. 577; awaiting sale at destination, *General Oil Company v. Crain*, 209 U. S. 211; in state and not committed to transportation beyond, *Coe v. Errol*, 116 U. S. 517; chain store tax, *Liggett v. Lee*, 288 U. S. 517.

(2) Clayton Act: Gasoline brought into state for retail sale:

> "We do not think the Supreme Court has gone so far as to hold that, to meet the anticipated demand of customers without a specific contract therefor, interstate commerce continues until the demand eventuates in the form of an order or contract and the merchandise is delivered to the retailer." *Lipson v. Socony Vacuum Corp.*, 87 F. (2d) 265, 267.

(3) Interstate Commerce Act: Railroad wholly within state refused to accept shipments except on own B/L, held not within purview of Interstate Commerce Act, as written, *I. C. C. v. B. Z. & C. R. R.*, 77 Fed. 942, *U. S. & I. C. C. v. Chicago K. & S. R. Co.*, 81 Fed. 783; but contra when participating in through B/L and rates, *Boyd v. U. S.*, 275 Fed. 16.

The facts in the above cases cited in the petition are clearly distinguishable from the facts in the instant case.

Petitioner avoids rulings of its cited cases directly supporting the opinions of the Court of Appeals, below. For example, the quotation from the opinion in *B. & O. v. Settle*, 260 U. S. 166 at page 173, as set forth at page 11 of the petition, is extracted without reference to the last sentence of the paragraph from which it is taken, which reads:

> "The distinction is clear between cases of that character and the one at bar, where the essential nature of the traffic as a through movement to the point of ultimate destination is shown by *the original and persisting intention of the shipper which was carried out.*"

The emphasis above supplied gives full support to the Circuit Court of Appeals, below, in its conclusion in the instant case.

This omitted quotation likewise brings *Atlantic Coast Line R. Co. v. Standard Oil Co.*, cited page 11 and quoted page 12 of the petition into proper perspective. The facts in that cited case are clearly distinguished by the expression of the Court at page 542, as follows:

> "It is apparent from the nature of the business that it is not known at any given time to what destination a particular quantity of these products will ultimately go. It is not until after an order is received at Wilmington that the destination of a particular shipment can be determined. The manager of the Wilmington plant states: 'I know when I receive this oil (at Wilmington). I hold it in the warehouse and the tanks until I receive orders to ship it out'."

In the instant case the destination is known. The film is shipped to go beyond the exchange to the exhibitors to carry out the obligation of the pre-existing contract to provide such print for showing.

In the cited case of *Atlantic Coast Line R. Co. v. Standard Oil,* 275 U. S. 257, 267, Justice Taft, enunciated these principles:

> "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character."

And at pages 268, 269, said:

> "These cases are illustrations to show that the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it."

The cited case of *B. & O. v. Settle,* 260 U. S. 166, gives support to the opinion of the Court of Appeals, below, in the statement pages 170-171:

> "And whether the interstate or the intrastate tariff is applicable depends upon the *essential character of the movement.* That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration. Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498; Ohio Railroad Commission v. Worthington, 225 U. S. 101; Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111; Railroad Commission of Louisiana v. Texas & Pacific Ry. Co., 229 U. S. 336. And in Baer Brothers Mercantile Co. v. Denver & Rio Grande R. R. Co., 233 U. S. 479, 490, this Court held that a carrier cannot, by separating the rate into its component parts, charging local rates and issuing local way bills, convert an interstate shipment into intrastate transportation, and thereby deprive a shipper of

the benefit of an appropriate rate for a through interstate movement.

"If the *intention* with which the shipment was made had been actually in issue, the fact that possession of the cars was taken by the shipper at Oakley and that they were not rebilled for several days, would have justified the jury in finding that it was originally the *intention* to end the movement at Oakley and that the rebilling to Madisonville was an afterthought. But the defendant Clephane admitted at the trial that it was *intended* from the beginning that the cars should go to Madisonville; and this fact was assumed in the instructions complained of. In other words, Madisonville was at all times the destination of the cars, Oakley was to be merely an intermediate stopping place; and the *original intention* persisted in was carried out. That the interstate journey might end at Oakley was never more than a possibility. Under these circumstances, *the intention as it was carried out determined*, as matter of law, the essential nature of the movement; and hence that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the *intention* with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been *intended*, these incidents are without legal significance as bearing on the character of the traffic. For instance, in many cases involving transit or reconsignment privileges in blanket territory, most or all of these incidents are absent, and yet the through interstate tariffs

apply. See Atchison, Topeka & Santa Fe Ry. Co. v. Harold, 241 U. S. 371; St. Louis Southwestern Ry Co. v. United States, 245 U. S. 136; Central Railroad Co. of New Jersey v. United States, 257 U. S. 247, Compare Philadelphia & Reading Ry. Co. v. Hancock, 253 U. S. 284."

And at page 172:

"The sole question, therefore, which could arise in this case was whether the movement actually entered upon at point of origin, and persisted in, was transportation of the lumber to Madisonville."

And at page 173:

"The distinction is clear between cases of that character and the one at bar, where the essential nature of the traffic as a through movement to the point of ultimate destination is shown by the original and *persisting intention* of the shipper which was carried out."

(Extended quotation and emphasis supplied to rebut persistence in petition, pages 10, 11, that Court of Appeals, below, erred in considering "intention".)

Particularly pertinent is the cited case of *Chicago, Milwaukee & St. Paul R. R. v. Iowa,* 233 U. S. 334:

"The question is with respect to the nature of the actual movement in the particular case; and we are unable to say upon this record that the state court has improperly characterized the traffic in question here. In the light of its decision, the order of the Commission must be taken as referring solely to intrastate transportation originating at Davenport."

Cited is *Southern Pacific Co. v. Arizona,* 249 U. S. 472, 477:

"Whether a shipment was at a given time in interstate commerce is a question of fact, Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 108."

U. S. v. Erie R. Co., 280 U. S. 98, 101, 102, is cited but the pertinent finding therein not shown in the petition is as follows:

> "But the nature of the shipment did not depend upon the question when or to whom title passes, P.R.R. v. Clark Coal Co., 238 U. S. 456, 465-6. It is determined by the essential nature of the commerce. B. & O. S. W. R. v. Settle, 260 U. S. 166, 170. It is not affected by the fact that the transaction is initiated or completed under a local bill of lading which is wholly intrastate, Ohio R. R. Comm. v. Worthington, 225 U. S. 101, 108-110; Texas and New Orleans R. Co. v. Sabine Tram Co., 227 U. S. 111, Hughes Bros. Co. v. Minnesota, 272 U. S. 469; or by the fact that there may be a detention before or after shipment on the local bill of lading, Carson Petroleum Co. v. Vial, 279 U. S. 95. The findings of the Commission, that the broker acts only as agent and that from the time that the pulp is put aboard the steamer there is a continuing *intent* that it should be transported to Garfield, ought to have been accepted by the District Court as conclusive, since there was ample evidence to sustain them. Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268; Virginian R. Co. v. United States, 272 U. S. 658."

The petition, page 14, seeks to avoid the controlling effect of *Beggs v. Kroeger Co.*, 167 F. (2d) 700, by saying "the goods remained only long enough to pick them up and haul them to the chain stores." The case shows no such limiting fact. The Court said:

> "Practically all of the goods the defendant transported to its retail stores in Arkansas were processed, manufactured or processed outside the state for the specific purpose of being moved to the retail stores for sale. That part of the goods which went through the warehouse did not 'come to rest' in the warehouse. The

warehouse was merely a convenient instrumentality for the division of the shipments coming to it, and the continuation of the movement of each part to the retail stores. The facts in this case distinguish it from cases such as Atlantic Coast Line Ry. Co. v. Standard Oil of Ky., 275 U. S. 257. Here, the defendant knew when the shipments began out state that all of them were destined to the retail stores. The warehouse was not a wholesale establishment, and none of the goods that entered it were resold."

Precisely the facts in the instant case applying to the distributors of film. The Court of Appeals, below, properly found the controlling facts, in the case here for consideration, in its supplemental opinion, R. 132, as follows:

"The record is devoid of any evidence showing that the distributors accumulate a stockpile of films in the exchanges, where the exhibitors may go, make their selection, purchase what they want, and take it with them, as you do when you go to a retail merchandising store.

"We adhere to our conclusion that the record makes it clear that the contracts between all the exhibitors and a distributor contemplate a continuing movement of a film from the distributor through the exchange to all of the exhibitors and from the last exhibitor back to the distributor from whence it came, interrupted only temporarily at the exchange for purposes of mutual benefit to all the parties."

These conclusions are in full harmony with the law of the cases cited by the petition.

The decisions of the Court of Appeals, Tenth Circuit, are based upon a proper finding and appreciation of the facts, and supported by the prevailing law. No sound basis of error has been established by the petition.

Conclusion.

No recognized basis for assumption of jurisdiction is shown by the petition.

Therefore, the petition for certiorari should be dismissed.

Respectfully submitted,

WAYNE C. DURHAM,
Suite 3, Utah Building,
351 South State Street,
Salt Lake City 1, Utah.
HAROLD S. SHERTZ,
226 S. Fifteenth Street,
Philadelphia 2, Penna.,
Attorneys for Respondent.

Of Counsel:

KING, ANDERSON & DURHAM,
and
SHERTZ, BARNES & SHERTZ.